STATE OF MICHIGAN

COURT OF APPEALS

MARV GROOM, Plaintiff-Appellant,	UNPUBLISHED June 16, 2015
v	No. 321115 Lapeer Circuit Court
RAPAK LLC, Defendant-Appellee.	LC No. 13-046130-CZ

Before: SAAD, P.J., and M. J. KELLY and SHAPIRO, JJ.

PER CURIAM.

In this employment action, plaintiff appeals by right from the trial court order granting summary disposition in favor of defendant under MCR 2.116(C)(10) on plaintiff's claims of breach of contract and, in the alternative, promissory estoppel. We affirm.

I. FACTS

Plaintiff was hired by defendant in 1995 as a mechanic. Plaintiff worked his way up to the position of Regional Sales Manager, a position he held until his termination in September 2012. In his deposition, plaintiff acknowledged that he was an at-will employee at all times and that, therefore, he was aware that he could be terminated at any time with or without cause. From approximately August 2006 to March 15, 2012, plaintiff's direct supervisor was Dan Petriekis, then serving as defendant's National Sales Director. Plaintiff's second-level supervisor was Dave Kouchoukos, the Vice President of Sales.

In early 2012, defendant undertook numerous organizational changes. Relevant to this case, in March 2012, Petriekis was removed from his supervisory responsibilities over defendant's sales force and was reassigned to an equipment sales and servicing role. As such, Petriekis was no longer plaintiff's supervisor, although the two remained friends. Plaintiff briefly reported to Kouchoukos directly, but then began reporting to David Murphy, the newly hired National Sales Director, who in turn reported to Kouchoukos.

In September 2011, defendant shifted the goals of its sales force from account management to obtaining new sales and customers. Under this new model, plaintiff failed to meet his established sales expansion goals. As a result, on March 20, 2012, Kouchoukos met with plaintiff over the phone and placed him on a Performance Improvement Plan (PIP). The PIP, which plaintiff signed on March 21, 2012, required plaintiff to meet certain measures for

improvement within 60 days. Plaintiff testified that he understood that if these goals were not met, his employment could be terminated.

Plaintiff testified that he worked to comply with the terms of the PIP and refrained from looking for other jobs in hopes of remaining employed by defendant. Plaintiff failed to achieve the PIP's objectives within the allotted 60-day period, but defendant gave him approximately three additional months to reach the goals. Plaintiff failed to meet the terms of the PIP by September 2012 and, as a result, defendant terminated his employment on September 17, 2012. Plaintiff does not allege that he was improperly or unlawfully terminated.

Plaintiff testified that, during the termination meeting, he asked about his severance pay and was told that defendant does not provide severance pay. He then brought this suit asserting that he was entitled to severance pay as a matter of contract or, alternatively, promissory estoppel.

In support of this claim, plaintiff testified that he recalled that some employees who were terminated from the company received severance pay. In addition, he testified that because of his concern about possible termination, on April 4, 2012, he spoke with Petriekis, his previous supervisor. He testified that he expressed his concern that he might be fired and need severance pay. Petriekis responded by saying "that the severance policy was to pay one week of your annual salary times the number of years that you were employed."

In his testimony, Petriekis agreed that such a conversation had occurred. Specifically, he testified that plaintiff asked him "did [defendant] have a [severance] policy an d what was said policy." "I said, yes, they based off of what I was—my understanding from HR and past employees who were terminated. And that policy was what I stated, one week's pay for every year of service."

Plaintiff concedes that Petriekis was not his supervisor at the time of the conversation in question and that he never spoke with his actual supervisor or with human resources staff about severance pay prior to his termination. Petriekis acknowledged that he was not authorized to award a departing employee severance pay at the time of the conversation and had never had the authority to award severance pay. When questioned about his understanding of defendant's severance policy, Petriekis stated:

> I can't speak to [defendant]'s policy. I can speak to what my understanding was based off past employees and what HR communicated to me verbally and in writing in regards to [the short term employee] That was my understanding.
>
> I can't speak to a company handbook or something to that effect. I wasn't involved in that end of the business.

In support of his claim, plaintiff also proferred a series of emails, provided to him by Petriekis, involving the denial of severance pay Petriekis had sought for a recently departing short-term employee. In denying severance pay to this employee, Lynn Marin, defendant's human resources manager, wrote "[t]he practice we have on severance pay is actually paid out considering the years of service with the company. One week is paid for each year of service."

Plaintiff acknowledged that he was aware that the emails provided to him by Petriekis did not constitute an "official policy memorandum" of defendant. In her deposition, Marin explained that her statement in the emails concerning the short-term employee did not reflect a policy of paying severance to all long-term employees. She testified that defendant determined on a case-by-case basis whether to pay severance and that the formula for calculating the amount was only a rule of thumb used if, and only if, severance pay was granted.

Kevin Grogan, defendant's president since August 2011, averred that during his tenure "and as far back as I am aware, [defendant] did not have any policy or standard practice of providing severance pay to departing employees." Grogan acknowledged that defendant's previous president "authorized severance to select individuals on a case-by-case basis." Grogan has continued this practice and stated that he is the only individual capable of authorizing severance payments. Grogan further stated that, generally, severance was only authorized where defendant eliminated the terminated employee's position and that this was not the case with plaintiff's termination. Grogan averred that he was only aware of one exception to this general rule—a particular terminated salesman was given "severance" in the form of commissions he had already earned; Grogan stated that, although termed severance, "it was more akin to a pro rata commission payment." Plaintiff acknowledged that, upon termination, he received compensation for "all of [his] accrued but unused vacation time" and that he had no reason to believe that defendant withheld payment of any commissions he was due at that time.

Grogan also stated that during his tenure, no employee of defendant that was terminated while subject to a PIP (like plaintiff) was given severance. Grogan reviewed defendant's records prior to his employment as president and could not find a record of any employee who received severance under such circumstances. Finally, Grogan averred that plaintiff never asked him about severance and that he never had any conversations with Petriekis concerning the conditions of severance pay to terminated employees.

II. BREACH OF CONTRACT

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendant on his breach of contract claim.[1]

[1] We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Id*. at 509-510. All reasonable inferences are to be drawn in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Ernsting*, 274 Mich App at 509. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1

"A party claiming a breach of contract must establish (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Dunn*, 303 Mich App at 774 (quotation marks and citation omitted).

As a preliminary matter, plaintiff does not allege, and there is no evidence of, an express contract between himself and defendant regarding his employment or possible severance. Rather, plaintiff alleges that the representations made by Petriekis in their April 4, 2012 conversation established a contract which defendant breached by failing to pay plaintiff severance upon his termination. We disagree.

Petriekis was not in the position to enter into a severance contract on behalf of defendant. Defendant has presented uncontradicted evidence that only its president could authorize severance payments. While plaintiff claims that he was unaware that Petriekis could not unilaterally offer severance, he was aware the Petriekis was not his supervisor. He was also aware, due the emails he was provided, that on at least one occasion Petriekis requested that severance be paid to an employee but had his request denied by defendant. Because Petriekis did not speak for defendant with regard to severance, any promises regarding severance he allegedly made to plaintiff could not give rise to a contract between plaintiff and defendant.

Moreover, to the extent that plaintiff was subject to an implied contract for severance pay by virtue of defendant's general severance policy, there is no evidence that defendant breached such a contract. Plaintiff became aware, through the emails provided by Petriekis, that when defendant did pay severance, it did so on the basis of one week's pay per year of service. However, this was not the full extent of the policy. Defendant presented unrefuted evidence that severance was determined on a case-by-case basis and had never been given to an employee who was terminated for failure to meet the requirements of a PIP, such as plaintiff. Plaintiff does not allege that these contentions are in error or that some other policy existed. There is no evidence that plaintiff was not considered for severance pay on a case-by-case basis. Indeed, it appears that, consistent with defendant's prior practices, plaintiff was denied severance because he was terminated for performance-based reasons and not because defendant elected to eliminate his position.

Accordingly, plaintiff failed to establish a question of fact as to whether a contract for severance pay existed between himself and defendant or, if an implied contract existed, that defendant breached the contract. The trial court did not err in granting summary disposition in favor of defendant on plaintiff's breach of contract claim.

III. PROMISSORY ESTOPPEL

(2008). "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Ernsting*, 274 Mich App at 510. "The existence and interpretation of a contract are issues of law reviewed de novo." *Dunn v Bennett*, 303 Mich App 767, 774; 846 NW2d 75 (2013).

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendant on his alternative claim of promissory estoppel.

> The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promise and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided. [*Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008).]

The only actions plaintiff asserts constitute an actionable promise are the statements made by Petriekis in the April 4, 2012 conversation. "A promise is a manifestation of intention to act or refrain from acting in a specific way, so made as to justify a promise in understanding that a commitment has been made. The promise must be definite and clear, and the reliance on its must be reasonable." *Id*. In this case, plaintiff has failed to establish a question of fact regarding whether Petriekis actually promised that plaintiff would receive severance. Rather, Petriekis informed plaintiff that he believed, based on an email regarding an unrelated termination, that defendant paid severance at a rate of one week's pay per year of service. Indeed, plaintiff testified as follows:

> *Q*. . . . Did Mr. Petriekis ever use that word, "promise"? "I promise you you will get severance pay"?
>
> *A*. No.
>
> *Q*. Did he say that he guaranteed you would get severance pay?
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> *A*. No.
>
> *Q*. Did he say he thought you would get severance pay?
>
> *A*. No.
>
> *Q*. Did he tell you that he was authorized to give out severance pay?
>
> *A*. No.

Even if Petriekis's statements were construed as a promise to pay plaintiff severance, Petriekis could not have reasonably believed that plaintiff would rely on that promise nor could plaintiff himself have reasonably relied thereon. At the time of the conversation, Petriekis and plaintiff were both aware that Petriekis was no longer plaintiff's supervisor. Petriekis knew that he could not unilaterally authorize severance pay and Grogan averred that he never had any conversation with Petriekis regarding the circumstances under which severance would be paid to a terminated employee. Plaintiff was also aware of this fact by virtue of the emails provided by Petriekis, wherein he sought severance pay for a terminated employee, but was denied.

Accordingly, plaintiff has failed to establish the necessary questions of fact as to his claim of promissory estoppel and the trial court did not err by granting summary disposition in favor of defendant on that claim.

Affirmed.

/s/ Henry William Saad
/s/ Michael J. Kelly
/s/ Douglas B. Shapiro